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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

ANGELO ROBERTS,

Defendant and Appellant.

B297705

(Los Angeles County
Super. Ct. No. BA271564)

APPEAL from an order of the Superior Court of
Los Angeles County, Robert Perry, Judge. Reversed.

Theresa Osterman Stevenson, under appointment by the
Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief
Assistant Attorney General, Susan Sullivan Pithey, Assistant
Attorney General, Idan Ivri and Blythe J. Leszkay, Deputy
Attorneys General, for Plaintiff and Respondent.

Angelo Roberts appeals an order dismissing his petition for resentencing pursuant to Penal Code section 1170.95 (Stats. 2018, ch. 1015, § 4). Roberts contends the trial court erred when it found him ineligible for resentencing and when it found Senate Bill No. 1437 (2017-2018 Reg. Sess.) (SB 1437) unconstitutional. The prosecution concedes Roberts is entitled to additional procedures under Penal Code section 1170.95. We agree and reverse.

All references are to the Penal Code unless otherwise specified.

I

We use the opinion in Roberts's direct appeal to provide context. (*People v. Jones et al.* (May 15, 2008, B193068) [nonpub. opn.] (*Jones*).) We granted Roberts's request for judicial notice of the opinion, which the trial court relied on to deny Roberts's petition. Both Roberts and the prosecution recite portions of the opinion to present facts from the underlying case. Neither party disputes these facts.

On March 30, 2003, two men got out of a stolen car and shot at Isaiah Cain, who later died of gunshot wounds. (*Jones, supra*, B193068, at [p. 7].) Roberts's DNA was in the stolen car. (*Ibid.*) Several hours later, Roberts and others robbed two men at a gas station and left in a second stolen car. (*Id.* at [p. 8].) On April 1, 2003, police stopped Roberts in a third stolen car of the same make and year as the first two cars. (*Id.* at [p. 9].)

The court instructed the jury it could convict Roberts of Cain's murder under either of two theories: malice aforethought or felony murder.

The jury found Roberts guilty of first degree murder (§ 187, subd. (a)) committed in the course of an attempted carjacking

(§§ 664, 215, subd. (a)), attempted robbery (§§ 664, 211), three counts of unlawful taking of a vehicle (Veh. Code, § 10851, subd. (a)), and two counts of second degree robbery (§ 211). The jury found true gang enhancement allegations (§ 186.22, subd. (b)(1)(A)) and firearm allegations (§ 12022.53, subds. (b), (c), (d), & (e)(1).)

The trial court sentenced Roberts to state prison for a term of 25 years to life for the murder conviction, with a consecutive term of 25 years to life for the firearm enhancement, and a consecutive determinate term of 23 years and four months for the other counts. In 2008, this court remanded for resentencing and otherwise affirmed Roberts's convictions in the aforementioned unpublished decision. (*Jones, supra*, B193068, at [p. 44].)

On March 11, 2019, after the Legislature passed SB 1437, Roberts filed a petition for resentencing under section 1170.95. The trial court summarily denied the petition because: 1) Roberts "was one of the shooters" and thus not entitled to relief, and 2) SB 1437 is unconstitutional.

We reverse the court's denial order and remand for further proceedings consistent with our opinion.

II

We begin with the trial court's determination Roberts was not entitled to relief. Roberts and the prosecution agree section 1170.95 applies and Roberts is entitled to counsel and briefing.

Effective January 1, 2019, SB 1437 amended the felony murder rule and natural and probable consequences doctrine for murder. (Stats. 2018, ch. 1015, § 1(f).) SB 1437 allows murder liability only if a defendant was the actual killer, acted with the intent to kill, or was a major participant in an underlying felony

and acted with reckless indifference to human life. (*Ibid.*; §§ 188, subd. (a)(3); 189, subd. (e).)

SB 1437 also added section 1170.95, which sets out a procedure for those convicted of felony murder or murder under the natural and probable consequences theory to petition the sentencing court to vacate their conviction and to be resentenced on any remaining counts. (§ 1170.95, subd. (a).)

Section 1170.95 has a multi-step procedure, which includes an initial review and two prima facie reviews. (*People v. Verdugo* (2020) 44 Cal.App.5th 320, 327–328, review granted Mar. 18, 2020, S260493 (*Verdugo*).) In the first step, the court determines whether petitions are facially sufficient. (§ 1170.95, subd. (b)(2).) Second, before any briefing, the court determines whether petitioners have made a prima facie showing they fall within the provisions of the section. (*Id.*, subd. (c); *Verdugo*, at pp. 327–328.) This second step weeds out those who are not entitled to relief as a matter of law. (*Verdugo*, at p. 329.) Third, the court appoints counsel, takes written briefs, and determines whether petitioners have made a prima facie showing they are entitled to relief. (*Id.* at p. 328; § 1170.95, subd. (c).) If petitioners make that showing, the court must issue an order to show cause and must hold a hearing. (§ 1170.95, subds. (c) & (d).)

The second step is at issue in this case.

Under the second step, the trial court’s job is to decide, making all factual inferences in favor of the petitioner, whether the petitioner is ineligible for relief as a matter of law. (*Verdugo*, *supra*, 44 Cal.App.5th at pp. 328–329, review granted.) The court examines the complaint, information, or indictment; the verdict form; and the abstract of judgment. (*Id.* at pp. 329–330.) A petitioner is eligible for relief if: 1) the prosecution accused the

petitioner under a theory of felony murder or under the natural and probable consequences doctrine; 2) the petitioner was convicted of first or second degree murder; and 3) the petitioner could no longer be convicted of murder due to the amendments. (§ 1170.95, subd. (a).) A petitioner is not within the provisions of the section as a matter of law if, for example, the petitioner was not convicted of first or second degree murder or the petitioner admitted being the actual killer as part of a guilty plea. (*Verdugo*, at p. 330.)

The trial court erroneously determined Roberts failed the second step because “[e]vidence at trial showed Roberts was one of the shooters.” The trial court apparently based this on evidence from the opinion in Roberts’s direct appeal, which found “abundant” evidence supported Roberts’s convictions, including the murder conviction. (*Jones, supra*, B193068, at [p. 20].)

As the prosecution concedes, the existence of some evidence Roberts may have been the shooter is insufficient to show he is ineligible for section 1170.95 relief as a matter of law. His jury was instructed on the theories of malice aforethought and felony murder. Neither the jury instructions nor the verdicts indicate Roberts was necessarily convicted of murder based on a theory of actual malice. Nor did the jury decide whether Roberts was a major participant who acted with reckless indifference to human life. Roberts made a showing he falls within the provisions of section 1170.95 and he has the right to counsel and briefing to determine if he is entitled to relief.

As an independent ground for denying the petition, the trial court held SB 1437 unconstitutional. In two comprehensive opinions, the Fourth Appellate District, Division 1, analyzed and rejected the trial court’s reasoning, finding SB 1437

constitutional. (*People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270; *People v. Lamoureux* (2019) 42 Cal.App.5th 241.) On appeal, the prosecution says *Gooden* and *Lamoureux* are correct and all parties agree SB 1437 is constitutional. We agree SB 1437 is constitutional.

Roberts's alternative argument the court denied him due process by summarily denying his petition without counsel and without a hearing is moot.

DISPOSITION

The order denying Roberts's petition for resentencing is reversed. The matter is remanded to the superior court with directions to appoint counsel and proceed in accordance with section 1170.95.

WILEY, J.

We concur:

GRIMES, Acting P. J.

STRATTON, J.